Law Vol. 6.

MATTER OF MOMENT:

TO

DEDICATED TO THE

RIGHT HONOURABLE

HENRY, EARL BATHURST,

LORD HIGH CHANCELLOR

OF

GREAT BRITAIN.

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DEDICATION.

TO THE

Right Honourable HENRY, Earl Bathurſt,

Lord High Chancellor of Great Britain.

MY LORD, THE following Pages are publiſhed with a View of promoting public Good, and of doing ſomething that may tend to introduce into our Courts of Juſtice a better Regulation of their ſubordinate Officers. I do, my Lord, preſume to ſay, that few Matters of National Neceſſity require more frequent Returns of Legiſlative Deliberation than this important Branch of Buſineſs, in which ſo many of

his Majeſty's Subjects are daily engaged, and in which their Property and Peace of Mind are ſo materially concerned. Much Regulation is indeed wanted; great Reformation: and it is to Your Lordſhip that the Suitors of the ſeveral Courts, in a more eſpecial Manner, look up, and found on Your known Goodneſs their Expectations of Redreſs. Your Lordſhip is in every Reſpect qualified to be the principal Promoter of ſo expedient, ſo ſalutary a Meaſure: Your Virtues will prompt You; Your Religion will urge You; Your Abilities, Your Knowledge, and Your Conſequence will enable You to perform the Work: and, if any Thing can add to the home-felt Satisfaction which Your Lordſhip now enjoys from the Review of a Life employed in all the Duties of a Man, it will be the Conſciouſneſs of having reſtored an eſtabliſhed

Juſtice

Juſtice in the Land; and of having reſcued Thouſands of Your Fellow-Subjects from Rapine, Oppreſſion and Inſult.

I am,

My Lord,

Your Lordſhip's

moſt obedient and moſt devoted

humble Servant,

THE AUTHOR.

April, 1776.

A MATTER OF MOMENT.

BY a Pamphlet lately publiſhed—entitled, *Thoughts on the ſeveral Regulations neceſſary to the Appointment of an Advocate-General, and proper Officers under Him; for the Purpoſe of relieving the Clients of Lawyers from Unreaſonable Expence, and Intolerable Oppreſſion*—an Effort has been made to introduce into our Courts of Juſtice ſome neceſſary and important Regulations; but no Notice of any Kind has been taken of it: the public Writers of the Times are employed otherwiſe. The Subject is new; it is

unconnected with all Matters of Party; it has nothing to do with the great Art of getting Places, or of keeping them; no Man in Miniſtry, no Man in Oppoſition, no County, no Town, no Borough, is particularly intereſted in it. It is a Matter of public Concern; it is an Attempt to produce general Utility: yet, notwithſtanding the unlucky Circumſtances attending this Affair, I will offer an helping Hand to the Writer above-mentioned, and will point out to the Public a Matter of Moment——the Mode of examining Witneſſes in the Court of Chancery.

The Inſufficiency of written Evidence has fallen under the Conſideration of many Writers; and it is needleſs to ſay any Thing concerning it now-a-days, as all Men who think at all, think alike on that Subject. Conſtituted, however, as the Court of

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Chancery now is, written Evidence muſt of Neceſſity be admitted there: and, in regard to ſuch an Alteration of the Conſtitution of that Court, as would render Evidence of that Kind inadmiſſible, it would be a Work of Time and Difficulty; an Innovation not likely to take Place in theſe buſy Times. The only Thing that can be hoped for at preſent is, that ſome Alterations may be made in the Mode of tranſacting this Buſineſs; and that written Evidence may be made as ſerviceable to the Purpoſes intended, as the Nature of written Evidence will admit of. What the particular Alterations ſhould be it is not my Intention to dictate, but merely to point out what the Practice now is; and then ſubmit it to the Reader whether ſome Improvements are not wanted, and whether they ought not forthwith to be made.

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The Court of Chancery has Two Examiners, who enjoy Poſts of conſiderable Profit, and have under them ſeveral Officers. The Title of all Depoſitions, when copied and produced in Court, runs thus :——— "Witneſſes examined by Eſquire, "One of the Examiners of the High Court "of Chancery"——Now the Fact is, That Eſquire, One of the Examiners of the High Court of Chancery, never examined a ſingle Witneſs in his whole Life. The Poſts of the Examiners were in all Likelihood formerly conſidered as Offices of great Truſt and Conſequence. It is moſt probable that they preſided at the Examination of Witneſſes, and ſuperintended all Proceedings relative thereto; ſo as to prevent any Frauds that might be committed by their inferior Officers, or by the Agents of the Parties on either Side. But that is not the Caſe at preſent;

ſent; every Man who reſides in, or within a certain Diſtance of London, is examined by an Officer of inferior Rank, who is called an Examining Clerk, and of whom there are Six in Number. The Poſt of an Examining Clerk is not a Place of great Profit, or of great Account. They do not take their Buſineſs by Rotation, but are dependent upon the Solicitors; every Solicitor, on every freſh Occaſion, employing this or that Examining Clerk, according as his Diſcretion or Caprice may happen to direct.——And thus much I think it neceſſary to premiſe, becauſe many of the Improprieties attendant on the Examination of Witneſſes, depend upon theſe Circumſtances.

To proceed——When the Time appointed, by the Courſe of the Court, for the Examination of Witneſſes is arrived, the Agents for each Party draw Interrogatories; and, previous

vious to the drawing of theſe Interrogatories, a Solicitor has an Opportunity of ſeeing the Perſons who are to be examined, and of judging how far they can be made uſeful in the Caſe under his Care. As ſoon as the Interrogatories are ſettled, he lodges them with the Examining Clerk: and may he not at the ſame Time inſtruct him in regard to the ſtrong or weak Parts of his Client's Caſe; may he not give him the Names and *Characters* of the Perſons who are to be examined; may he not expreſs his Wiſhes that this or that particular Matter may be fully proved? and may not a bad Uſe be made, by the Examining Clerk, of the Information ſo given to him?

For Inſtance—A Witneſs is ſummoned, and he and the Examining Clerk are both ſworn before a Maſter in Chancery. This Ceremony being over, the Examining Clerk

is

is at Liberty to examine the Witneſs when and where he pleaſes. The moſt ſuitable, and I believe the moſt uſual Place for tranſacting this Buſineſs, is a Cloſet, or ſmall Study in the Examiner's Office, of which there are Six, and each Examining Clerk has the Poſſeſſion of One of them. Here then are the Examining Clerk and the Witneſs alone together; and both of them, perhaps, inclined to ſerve, as far as they can with Safety, the Party who was the Means of bringing them into that Situation.—— The Interrogatories are produced and read; the Witneſs gives his Evidence; the Examining Clerk writes it down; and the Whole being completed, the Witneſs ſigns his Name to it.——This Writing then remains in the Hands of the Examining Clerk, till after the final Cloſe of the Examination on both Sides.

Now

Now let us ſee what Miſchiefs may ariſe from this private, this ſtrangely-conducted Examination.—The Examining Clerk muſt neceſſarily be a Man well verſed in Buſineſs of this Kind; and, as ſuch, muſt of Courſe be conſidered by the Perſon then with him. May he not, therefore, aſſiſt in framing a plauſible Story; may he not aſſiſt in giving it Expreſſion; and may he not thereby ſtrengthen the Evidence of a corrupt and partial Witneſs?

Again——Should the Man who preſents himſelf for Examination, be of a different Turn; ſhould he be an open, upright, and unwary Perſon; may not the Examining Clerk adviſe; may he not now and then alter an Expreſſion, and ſo qualify it as to give a greater or leſs Force to particular Parts of the Evidence, than a Perſon of this Kind may be appriſed of? may he not ſometimes

prevent him from declaring the whole Truth; by telling him, That ſuch or ſuch a Matter which he has mentioned, is not neceſſary or proper to be ſet forth on that Occaſion? and laſtly, ſhould he not be ſatisfied with the Evidence that has been given, may he not, after the Departure of the Witneſs, make it ſomewhat more to his Liking?—Such Frauds as theſe may eaſily be committed; but ſuch Frauds as theſe cannot eaſily be detected.

I have been told that, during the Time Lord Hardwicke was Chancellor, a Piece of Roguery of the Kind laſt mentioned was ſuppoſed to be diſcovered.——A Perſon who had been examined as a Witneſs, did, by Accident, ſee the Writing which was produced and read in Court as his Depoſition: I ſay by Accident, becauſe, for the moſt Part, a Witneſs when he has been examined

departs, hears no more of the Matter, and thinks no more of it. But in this Caſe it happened otherwiſe; and the Perſon above-mentioned, upon Sight of the Writing ſo produced and read in Court as his Depoſition, declared, That it contained Matters very materially different from thoſe which he had ſet forth at the Time of his Examination. Whereupon the Solicitor for the Party who was ſuppoſed to be thereby aggrieved, applied to a great Lawyer now living, who was then One of the Counſel on that Side of the Cauſe, and requeſted to know what was proper to be done under theſe diſagreeable Circumſtances? The Anſwer that he received was, I believe, very proper. The great Lawyer told him, That nothing could be done: for all that could be produced on either Side, would be the Oath of one Man againſt the Oath of another

ther Man; the Oath of the Witneſs againſt the Oath of the Examining Clerk; and that the Court would in Courſe lean in Favour of their Officer.

Again—I have before ſaid, that when a Witneſs has been ſworn, the Examining Clerk is at Liberty to examine him when and where he pleaſes. Suppoſe, therefore, that a Tavern ſhould be thought the moſt convenient Place for tranſacting this Buſineſs. It is well known to every Man who has been for ſeveral Years paſt converſant in the Modes of Proceeding practiſed in this Court, that many Witneſſes have been examined at a Tavern; and, therefore, many more Witneſſes may be examined there. Let us, therefore, ſuppoſe that this Circumſtance ſhould happen; and let us conſider what Conſequences may ariſe from it.

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The Examining Clerk, the Solicitor, and the Witneſs meet; an Entertainment is prepared and ſerved up; the Solicitor ſounds the Praiſes of his Client; the Bottle goes round; the Heart of the Witneſs is made glad, and he is pleaſed with the Generoſity of the Party who is to pay for the Regale. May he not, under theſe Circumſtances, be prevailed upon to ſay a little more in Favour of the Man whoſe Meat he has eat, and whoſe drink he has drank, than he would have done had he been examined in a proper Place, and in a Manner ſuitable to the Solemnity of the Occaſion? That there may be ſuch a Witneſs cannot be doubted; that there may be ſuch a Solicitor is much to be feared; and that there may be ſuch an Examining Clerk is poſſible.——In regard to the preſent Set of Examining Clerks I have nothing to lay to their Charge; they may,

for

for any Thing that I know to the contrary, be very honeſt Men: but extraordinary and unneceſſary Confidence ſhould not be placed in any Man.

Further, it may be obſerved, that the Practice of the Court is particularly complaiſant to the Gentlemen of the Long Robe; for, when One of theſe learned Perſons is required to give Evidence, he is not examined by any Body, but the Interrogatories are ſent to him, and at his Leiſure he writes down what he thinks proper to ſay upon the Occaſion, and ſigns his Name to it. I am willing to ſuppoſe that no Miſchief ever ariſes from this ſingular Mode of Proceeding; but muſt nevertheleſs be of Opinion, that it is an improper Way of giving Evidence, which is to be received in a Court of Juſtice: and this Impropriety muſt be thought ſtill greater, if it ſhould happen (as

it ſometimes may) that the learned Perſon who gives his Evidence, ſhould be the very Man who framed the Interrogatories.

If the Modes of Practice, above ſtated, are not truly ſtated, let the Profeſſion contradict me; if they are, they require Alteration—immediate Alteration: perhaps, at this very Inſtant, the Ruin of ſome honeſt Man is meditated; perhaps it is accompliſhed.——Doubtleſs, there might, upon Enquiry, be found, in this Court, other Modes of Practice that demand Improvement; but I chuſe to confine myſelf to this at preſent, in Order that it may ſtand alone, a glaring Impropriety, a wonderful Inſtance of the Levity and Inattention of a great and enlightened Nation.

I cannot leave this Subject, without obſerving, That as many Regulations of the Practice of the ſeveral Courts of Juſtice are

much

much wanted; and as it does not ſeem to be the Intereſt of the Practitioners to be aſſiſtant in bringing them about; it is incumbent on every Man who wiſhes well to the Public, to exert himſelf, and to forward ſuch Regulations to the utmoſt of his Power.

FINIS.

CRAIG
BR. MUS.